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May 1, 1979

Prof. David R. Wrone
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Dear David:

I'm enclosing a re-draft I've done of your draft of the bibliography of Kennedy assassination lawsuits. I've limited my effort to the spectro part of your draft only. I thought it might save time for both of us in the long run if I did it this way rather than just scribbled some notes, which might not be understood anyway.

I suggest that you go over the re-draft and see what you think should be added to it, left out of it, rephrased or re-organized. Then I'll take another look at it. Where I've left out what was in your draft, I think I generally had a reason for it, but if you have any questions as to why, just ask. I may also have missed some things that should be put back in, as well as included some that should be left out.

One flaw in both drafts is insufficient attention to the goverment's arguments in its briefs. This may make the account seem one-sided to sophisticated readers. I was aware of this deficiency while writing but just didn't have the time to go back over the government's briefs and see exactly what it was that they argued.

I don't have the time now to comment on the rest of what you sent me. I'll try to find some time this weekend. I'll also try not to rewrite it as I've done with the spectro part but just to make comments on it. But I lack the kind of discipline that a good editor should have. I would rather write than edit. If my wife gives me a letter of protest to a department store to type, I invariably end up rewriting the whole thing. I guess it's a constituent, if non-tragic, flaw in my character.

Best regards to all. We very much look forward to seeing you soon.

Jim

Weisberg, Harold

Suits for Disclosure of Scientific Evidence Pertaining to the Assassination of President John F. Kennedy

Spectro F. A. Weisberg v. U.S. Department of Justice, Civil Action No. 2301-70 (District Court for the District of Columbia), Sirica J.

Suit brought under the Freedom of Information Act, Public Law 89-487 (Act of July 4, 1966), 80 Stat. 250, as codified by Public Law 90-23 (Act of June 5, 1967), 81 Stat. 54. In complaint filed in District Court on August 3, 1970, Weisberg sought the disclosure of the "spectrographic analysis of bullet, fragments of bullet and other objects, including garments and part of vehicle and curbstone said to have been struck by bullet and/or fragments during assassination of President Kennedy and wounding of Governor Connally."

Weisberg was represented by Washington, D.C. attorney Bernard Fensterwald, Jr. The Department of Justice was represented by Thomas A. Flannery, United States Attorney for the District of Columbia, and Assistant United States Attorneys Joseph M. Hannon and Robert M. Werdig, Jr.

Weisberg sought these records in the belief that if the laboratory tests had been properly done they would disprove key findings of the Warren Commission.

On October 6, 1970, the Department of Justice filed a motion to dismiss, or, in the alternative, for summary judgment. The Department contended that Weisberg was not entitled to copies of these records because they were protected by the Act's investigatory files exemption. The Department maintained that this exception

to the Act's mandatory disclosure requirements was a blanket exemption which protected all of the FBI's investigatory files from disclosure.

On November 9, 1970, the Department filed an affidavit by FBI Special Agent Marion E. Williams which claimed that the release of "raw data" from its investigative files to any and all persons who requested them "would seriously interfere with the efficient operation of the FBI and with the proper discharge of its important law enforcement responsibilities . . . ." It speculated that the release of such information could lead to "exposure of confidential informants; the disclosure out of context of the names of innocent parties, such as witnesses; the disclosure of the names of supsected persons on whom criminal justice action is not yet complete; possible blackmail; and, in general, do irreparable damage." It concluded by warning that: "Acquiescence to the Plaintiff's request in instant litigation would create a highly dangerous precedent . . . ."

During oral argument before Judge Sirica on November 16, 1970, Assistant United States Attorney Robert M. Werdig told the Court that the Attorney General of the United States had determined that it was not in the "national interest" to divulge the spectrographic analyses. This representation was made even though the Freedom of Information Act had specifically eliminated "national interest" as a ground for nondisclosure because it was too vague.

Ruling from the bench and without making any findings of fact, Judge Sirica granted the Department's motion to dismiss.

No evidence has ever been produced to substantiate Werdig's claim that the Attorney General had determined that it was not in the national interest to divulge the spectrographic analyses. Several years after Werdig made this assertion, Weisberg obtained records which show that at least by 1972 Department of Justice officials were trying to get the FBI to make a discretionary release of such records in order to avoid a possible adverse legal precedent which would harmful to the FBI's interests.

B. Weisberg v. U.S. Department of Justice, Case No. 71-1026, United States Court of Appeals for the District of Columbia Circuit

This case arose from Weisberg's appeal of Judge Sirica's order granting the government's motion to dismiss in Civil Action No. 2301-70. On appeal Weisberg was again represented by Bernard Fensterwald, Jr., with James H. Lesar serving as "of counsel." The Department of Justice was represented by Walter H. Fleischer, Assistant Attorney General L. Patrick Gray, III, Thomas A. Flannery, Harold H. Titus, Jr., Barbara L. Herwig, and Alan S. Rosenthal.

On appeal Weisberg attacked the affidavit of Marion E. Williams' as conclusory and far-fetched. He contended that the spectrographic analyses had not been compiled for a "law enforcement purpose, but rather as a result of a request by President Lyndon B. Johnson that the FBI conduct a special investigation for the President; that the Freedom of Information Act's "investigatory files" exemption did not extend blanket protection to all FBI

files; and that the Department had failed to show that disclosure of the spectrographic records would result in any harm to the FBI's law enforcement functions.

On April 14, 1972, a Court of Appeals' panel comprised of Chief Judge David L. Bazelon, Senior Circuit Judge John A. Danaher, and District Court Judge Frank R. Kaufman heard oral argument.

On February 28, 1973, The Court of Appeals issued its opinion. The majority opinion, written by Judge Kaufman and concurred in by Chief Judge Bazelon, held that the Williams' affidavit was "most general and conclusory" and "in no way explains how the disclosure of the records sought is likely to reveal the identity of confidential informants, or subject persons to blackmail, or to disclose the names of criminal suspects, or in any other way to hinder F.B.I. efficiency." Specifically holding that the Department had the burden of proving "some basis for fearing such harm," the Court reversed Judge Sirica and remanded the case to him for further proceedings.

In a highly emotional dissent, Senior Circuit Judge John A. Danaher asserted that "it is unthinkable that the criminal investigatory files of the Federal Bureau of Investigation are to be thrown open to the rummaging writers of some televion crime series, or, at the instance of some "party" off the street, that a court may by order impose a burden upon the Department of Justice to justify to some judge the reasons for Executive action involving Government policy in the area here involved." After offering his opinion that

"the law . . . forfends against [Weisberg's] proposed further inquiry into the assassination of President Kennedy," he concluded his dissent with a Latin phrase emblazoned in capital letters: "REQUIESCAT IN PACE."

The Department of Justice petioned for a rehearing by the full court. The Court of Appeals granted the Department's petition and vacated the panel decision. The case was then orally argued before the nine active members of the Court, Chief Judge Bazelon and Circuit Judges Wright McGowan, Tamm, Levanthal, Robinson, MacKinnon, Robb, and Wilkey, ~~and~~ Senior Circuit Judge Danaher.

On October 24, 1973, the Court of Appeals upheld Judge Sirica's original ruling by a 9-1 vote. Senior Circuit Judge Danaher wrote the majority opinion; Chief Judge Bazelon filed the lone dissent.

Factually inaccurate where it touched upon the events surrounding the assassination of President Kennedy, the Court's en banc opinion held that where Department of Justice files "were investigatory in nature" and "compiled for law enforcement purposes," then they are exempt from compelled disclosure. Weisberg v. U.S. Department of Justice, 495 F. 2d 1195 (D.C.Cir. 1973) (en banc), cert. denied, 416 U.S. 993 (1974). Because this meant that law enforcement agencies could protect virtually all their files simply by asserting that they had been compiled as the result of an investigation made for law enfocement purposes, this decision eviscerated the Freedom of Information Act. Ultimately, however, Congress amended the investigatory files exemption and specifically overrode

the decision of the Court of Appeals in the Weisberg case.

C. Weisberg v. U.S. Department of Justice, United States Supreme Court No. 73-1138

Weisberg filed a petition for a writ of certiorari seeking to have the Supreme Court review the decision of the Court of Appeals. Weisberg argued that the Court of Appeals' decision marked the first time that any Court of Appeals had converted the investigatory files exemption into a blanket exemption protecting all files said to be (1) investigatory in nature, and (2) compiled for law enforcement purposes, even though the agency had failed to show any conceivable harm which might result from disclosure. Weisberg contended that this interpretation of the investigatory files exemption was in direct conflict with the decisions of other Courts of Appeals and stressed the important implications the case had for the viability of the Freedom of Information Act. However, the Supreme Court denied certiorari, 416 U.S. 993, 94 S. Ct. 2405, 40 L.Ed. 2d 772 (1974). Only Justice William O. Douglas voted to grant certiorari.

"SPECTRO II"

A. Weisberg v. U.S. Department of Justice and United States Energy Research and Development Administration, Civil Action No. 75-0226 (United States District Court for the District of Columbia), Pratt, J.

In 1974 Congress amended the Freedom of Information Act. Public Law 93-502 (Act of November 21, 1974), 88 Stat. 1563. In amending the investigatory files exemption, Congress specified its intention to override the en banc decision of the United

States Court of Appeals for the District of Columbia Circuit in Weisberg. Senator Edward Kennedy asked Senator Hart, in an exchange which took place on the floor of the Senate, whether Hart's proposed amendment to the investigatory files exemption would override the Weisberg precedent and some other D.C. Circuit cases which followed it. When Senator Hart replied that it would, Senator Kennedy announced his support for the measure. It was then enacted over President Gerald Ford's veto.

On February 19, 1975, the effective date of the Amended Freedom of Information Act, Weisberg again filed suit for the spectrogarphic analyses made in connection with the investigation into President Kennedy's assassination. This time he also requested records on or pertaining to neutron activation analyses and other scientific tests on the physical evidence associated with the President's murder.

During the proceedings in front of Judge Pratt, the FBI submitted two affidavits by FBI Special Agent John W. Kilty, who was assigned to the FBI Laboratory. The first Kilty affidavit swore that the FBI had examined the President's clothing, the presidential limousine windshield, and a piece of curbstone allegedly struck by bullet by means of neutron activation analysis. When Weisberg sought the records of this testing, Kilty then executed a second affidavit in which he directly contradicted his first affidavit by declaring that, "upon further examination" the President's clothing, the windshield, and the curbstone had not been examined by means of neutron activation analysis. Notwithstanding this blatant discrepancy, Judge Pratt granted summary judgment in favor of the govern-

ment, ruling that the case was moot because the Department had "substantially complied" with Weisberg's request. This ruling was based on the government's claim that it had produced "all available" records sought by Weisberg.

B. Weisberg v. U.S. Department of Justice, et al, Case No. 75-2021, United States Court of Appeals for the District of Columbia Circuit

In this appeal Weisberg was represented by James H. Lesar. Justice Department attorney Michael Stein argued the case for the appellees. Assistant Attorney General Rex E. Lee, United States Attorney Earl J. Silbert, and Justice Department attorney Leonard Schaitman were also on the brief for appellees. The case was heard by a three-judge panel comprised of Circuit Court Judges Spotswood W. Robinson III and Malcolm R. Wilkey and United States District Court Judge _____ Jameson.

On appeal Weisberg argued that the government had not met its burden of showing that each document sought had been produced and that there were material facts in dispute, particularly as regarded the existence or nonexistence of certain records, which precluded summary judgment. Weisberg argued that it was essential that he be allowed to undertake discovery on this issue. District Judge Pratt had foreclosed Weisberg's attempts to obtain answers under oath to his interrogatories, labeling them "opressive."

The case was argued on June 3, 1976. Barely a month later, and just three days after the 10th anniversary of the enactment of the Freedom of Information Act, the Court of Appeals issued its opinion reversing Judge Pratt. The opinion, written by Judge Wilkey, held that there were issues of material fact in dispute,

and that Judge Pratt should not have dismissed Weisberg's interrogatories as oppressive. In remanding the case to the district court, the Court of Appeals declared that, "[t]he data which [Weisberg] seeks to have produced, if it exists, are matters of interest not only to him but to the nation." Saying that the existence or non-existence of these records "should be determined speedily on the basis of the best available evidence," the Court of Appeals stated that on remand Weisberg must take the testimony of live witnesses who had personal knowledge of events at the time the investigation was made." Weisberg v. U.S. Dept. of Justice, 177 U.S. App.D.C. 161, 543 F. 2d 308 (1976).

In addition to its significance as a legal precedent establishing the right of discovery in Freedom of Information Act cases, this decision is important because comparison with its earlier en banc decision reflects a changed attitude towards the Freedom of Information Act and a reversal of the Court's opinion of Weisberg and his work.

C. Weisberg v. U.S. Department of Justice, et al., Civil Action No. 75-0226 (United States District Court for the District of Columbia), Pratt, J.

On remand Weisberg utilized three forms of discovery: interrogatories, depositions, and requests for the production of documents. He took some 400 pages of deposition testimony from four FBI agents who had personally participated in the testing of items of evidence in the assassination of President Kennedy. The evidence developed or remand directly contradicted the affidavit of FBI Agent Kilty in which he swore that neutron activation analysis had not been performed

on the presidential limousine windshield. After first testifying that he could not recall whether the windshield scraping had been subjected to neutron activation analysis, FBI Special Agent John F. Gallagher then admitted, when confronted with evidence that the specimen had in fact been submitted to the nuclear reactor, that he had tested it.

Through discovery Weisberg also established that the spectrographic plates and notes on the testing of the curbstone were allegedly missing. This fact had been concealed from Weisberg and the district court when the case had first been before Judge Pratt in 1975. For example, while Kilty's affidavits had asserted that Weisberg had been provided with "all available" records within the scope of his request, they did not provide the essential information that records which had been created had not been provided him because, it was subsequently learned, they ~~allegedly~~ were "destroyed" or "discarded" during allegedly "routine housecleaning."

The discovery materials obtained by Weisberg are significant in a number of respects. If the deposition testimony of the FBI agents can be credited, it discloses a picture of the FBI Laboratory as bungling, uncoordinated, amateurish, inept, and anything but thorough, precise and reliable. It is a portrait quite opposite the highly-touted reputation that the FBI Lab has gained in the press and elsewhere.

The deposition testimony reveals ignorance of fundamental facts by the FBI agents who conducted the investigation of the President's murder. For example, FBI Special Agent Cortlandt Cunningham, who did the original ballistics testing of CE399, did not know that it had been wiped clean before it was sent to the FBI Lab. Agent

Gallagher could not remember testing key items of evidence and when asked to circle possible bulletholes on a photograph of the President's shirtcollar, he circled the buttonholes.

The testimony of the FBI agents is suspect at critical points. Their testimony is also marked by extreme personal antagonism towards Weisberg.

In addition to the discovery he undertook, Weisberg also put into the record some important affidavits and exhibits which address both the official version of the President's assassination and the credibiility of the government's claim that he had been provided all the records he sought. This included not only the lengthy affidavits which he himself executed, but an affidavit by an actual witness to the Kennedy assassination, James T. Tague, who apparently received a minor wound on his cheek when a ~~bullet~~ fragment riccocheted off the curbstone which the FBI tested (seven) months after the fact) by means of spectrographic analysis. The Tague affidavit ties in with the spectrographic plates and notes on the curbstone which the FBI claims were destroyed or discarded and with Weisberg's testimony that the curbstone was patched and that the FBI knew when it tested it that it had been altered from its original state.

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Through the affidavits and exhibits which he submitted to the district court, Weisberg also maintained that photographic evidence shows that the alleged bulletholes in the President's shirtcollar do not overlap, and that the tears in the shirtcollar and the nick in the President's tie were caused not by a bullet but by the fact that the tie was cut off by a scapel ~~at the time of the tracheotomy~~ during emergency medical efforts.

During his deposition, former FBI Special Agent Robert A. Frazier, who at the time of the President's assassination was head of the FBI Laboratory, testified that he had ordered an FBI Agent, he thought it was Special Agent Paul Stombaugh, to conduct an examination of the President's shirtcollar to determine whether the alleged bullet holes overlapped. However, the FBI has not produced any report or records pertaining to any such examination.

After establishing that records had been created which he had not been given, Weisberg noted the deposition of FBI Special Agent John W. Kilty, the agent responsible for conducting the search for such records. However, Judge Pratt quashed Kilty's deposition before Weisberg's counsel had even been served with the motion to quash the deposition. Subsequently, Judge Pratt granting the FBI's motion for summary judgment, again finding that there were no genuine issues of material fact in dispute, and that the FBI had given Weisberg all the documents it had. Weisberg v. United States Dept. of Justice, 438 F. Supp. 492 (D.D.C. 1977).

D. Weisberg v. U.S. Department of Justice, et al., Case No. 78-1107, United States Court of Appeals for the District of Columbia

Case was orally argued before the Court of Appeals on March 20, 1979. James H. Lesar represented Weisberg. John H. Korns argued the case for the appellees; also on the brief for appellees were United States Attorney Earl J. Silbert and Assistant United States Attorneys, John A. Terry, Michael W. Farrell, and Michael J. Ryan. The Court of Appeals' panel was comprised of D.C. Circuit Judges Spottswood W. Robinson III and David L. Bazelon, and Judge _____ Van Dusen of the United States Court of Appeals for the

Third Circuit.

In asking the Court of Appeals to reverse Judge Pratt for the second time, Weisberg's counsel reviewed the history of the scientific testing of JFK assassination evidence and presented the evidence for the existence of records not provided Weisberg. He contended that summary judgment had been inappropriate because there existed genuine issues of material facts in dispute; namely, whether the records said to have been destroyed or discarded had in fact been destroyed or discarded, and whether there had been a thorough search for allegedly missing records. He pointed out that the the government had not sworn under oath that all revelant files had been searched and that the records provided Weisberg themselves showed that only certain files had been searched. He also asserted that Judge Pratt had violated well-established principles of summary judgment. Thus, instead of evaluating the evidence to see whether material facts were in dispute, Pratt had resolved the factual issues himself. In addition, he had not applied the principle that matters of fact are to be viewed in the light most favorable to the party opposing summary judgment.

While the case was pending before the Court of Appeals, Weisberg obtained new evidence further discrediting the government's claims that important JFK assassination evidence had been "destroyed" or "discarded" during "routine housecleaning." This evidence, which Weisberg sought to bring to the attention of the Court of Appeals, over the government's vehement protests, showed that the FBI was

under instructions not to destroy or discard its records on its investigation of the assassination of President Kennedy, and that periodic reviews of field office records had been made to assure that the evidence was being maintained.